NO.

117

IN THE

Supreme Court of the United States

October Term, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON, STEWART BORIE and PAULA BROWNING DENCKLA,

Petitioners,

ELIZABETH DONNER HANSON, as Executrix and Trustee Under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

Brief for Certain Respondents.

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Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE AND PAULA BROWNING DENCKLA,
Petitioners,

v.

ELIZABETH DONNER HANSON, AS EXECUTRIX AND TRUSTEE UNDER THE LAST WILL OF DORA BROWNING DONNER, DECEASED,

WILMINGTON TRUST COMPANY, A DELAWARE CORPORATION, AS TRUSTEE UNDER THREE SEPARATE AGREEMENTS, (1) AND (2) WITH WILLIAM H. DONNER DATED MARCH 18, 1932 AND MARCH 19, 1932, AND (3) WITH DORA BROWNING DONNER DATED MARCH 25, 1935,

DELAWARE TRUST COMPANY, A DELAWARE CORPORATION, AS TRUSTEE UNDER THREE SEPARATE AGREEMENTS, (1) WITH WILLIAM H. DONNER DATED AUGUST 6, 1940, AND (2) AND (3) WITH ELIZABETH DONNER HANSON, BOTH DATED NOVEMBER 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, GUARDIAN AD LITEM FOR DOROTHY B. R. STEWART AND WILLIAM DONNER DENCKLA,

ELWYN L. MIDDLETON, GUARDIAN OF THE PROPERTY OF DOROTHY B. R. STEWART, A MENTALLY ILL PERSON,

EDWIN D. STEEL, JR., ESQUIRE, GUARDIAN AD LITEM FOR JOSEPH DONNER WINSOR, CURTIN WINSOR, JR., AND DONNER HANSON,

BRYN MAWR HOSPITAL, A PENNSYLVANIA CORPORATION, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER AND MARY GLACKENS,

LOUISVILLE TRUST COMPANY, A KENTUCKY CORPORATION, AS TRUSTEE FOR BENEDICT H. HANSON, AND AS TRUSTEE UNDER AGREEMENTS WITH WILLIAM H. DONNER, WILLIAM DONNER ROOSEVELT, JOHN STEWART AND BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR CERTAIN RESPONDENTS.

I. INTRODUCTION.

This is a joint brief filed on behalf of two of the respondents, Wilmington Trust Company, a Delaware corporation, as Trustee under an inter-vivos trust agreement dated March 25, 1935, with Dora Browning Donner, and Delaware Trust Company, a Delaware corporation, as Trustee under three separate trust agreements: (1) with William H. Donner, dated August 6, 1940; (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948.

II. COUNTER-STATEMENT OF THE CASE.

The trust agreement of 1935 (A21) was executed in Wilmington, Delaware (At that time, Mrs. Donner, the trustor, was a resident of Pennsylvania) and the securities described in the schedule attached to the agreement were transferred and delivered to the Trustee in Delaware and continued there in its possession and was administered wholly in Delaware. The Wilmington Trust Company had no place of business and transacted no business in Florida (A228). The provisions of the trust agreement of 1935 need not be repeated here, but it did provide that the Trustee would hold, manage, invest and reinvest the trust fund, collect the income, and after payment of taxes and expenses, pay over the net income to the trustor, Mrs. Donner, during the term of her natural life. The agreement provided that upon the death of trustor, the Trustee should convey and deliver the trust fund unto such persons and in such manner and amounts "as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her Last Will and testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita." It further provided a gift over to Trustor's next of kin in default of appointment or issue (A22).

In 1935 and 1939 (A38-46) the trustor delivered instruments in writing to Trustee purporting to exercise her reserved power of appointment. In 1944, Mrs. Donner, the trustor, became a resident of Florida, where she resided until her death in 1952. On December 3, 1949, as modified on July 5, 1950, the trustor executed and delivered to trustee the instruments in writing of 1949 and 1950, in which she exercised her reserved power of appointment under the trust agreement of 1935 (A30-37). These were the last instruments in writing delivered to the Trustee. Pursuant to said instruments in writing of 1949 and 1950, the trustee, Wilmington Trust Company, transferred and delivered to Delaware Trust Company, Trustee, the sum of $400,000.00 in cash and securities, and also delivered the amounts appointed to the other appointees designated by the trustor, aggregating $17,000.00. It is to be noted that the transfer and delivery to Delaware Trust Company, Trustee, of the funds appointed to it, was made in March, 1953, long before the institution of the Florida action in January of 1954. Since the receipt of the funds, Delaware Trust Company has continued to hold them, with various substitutions, under the trusts to which they were appointed, in Delaware. Delaware Trust Company has no place of business and transacts no business outside of Delaware. At the time of the transfer and delivery of the trust funds to Delaware Trust Company, it had no knowledge that any attack would be made on the trust agreement of 1935, or the exercise of the powers of appointment pursuant thereto.

By her will dated December 3, 1949 (A14), Mrs. Donner (in item Fifth thereof) directed her executrix to pay all taxes which by reason of her death might become payable with respect to the property appointed by the exercise of her power of appointment under the trust agreement dated March 25, 1935, and to divide any balance [not so appointed] into two parts, which she then bequeathed,

In other words, the trust agreement of 1935 was executed in Delaware, the trust fund delivered to a Delaware trustee, which held and administered the trust fund in Delaware, and pursuant to the instruments in writing of 1949 and 1950, the Trustee transferred and delivered a substantial part of said trust corpus to Delaware Trust Company, another Delaware resident, as trustee of other trusts held and administered in Delaware. At no time since 1935, have any of the trust funds received by Delaware Trust Company, pursuant to the exercise of the power of appointment, ever been held or administered outside of the State of Delaware (A238).

The Delaware suit for a declaratory judgment was filed on July 28, 1954 (A1). The plaintiff was the executrix and trustee under the will of Dora Browning Donner, who died on November 20, 1952, having been duly appointed and qualified in Florida, the domicile of the testatrix at her death. The testatrix was the same Dora Browning Donner who executed the trust agreement of 1935, as trustor (A21). Prior to the filing of the Delaware suit, on January 22, 1954, certain of the defendants therein, Denckla and Middleton, guardian, filed suit in Florida, against the Delaware plaintiff and certain of the other Delaware defendants, including Wilmington Trust Company and Delaware Trust Company,[1] seeking a declaratory decree purportedly to construe the Florida will but actually to determine that the instruments in writing of 1949 and 1950 (A30-37) were not a valid exercise of powers of appointment under a trust (A71). Wilmington Trust Company and Delaware Trust Company were not served with process in Florida, and said

1. The complaint in the Florida action stated:

"The above named corporate defendants are named as defendants in their individual corporate capacities and as trustees representing various trusts as disclosed by this bill for declaratory decree, in order that they may be bound by any decree entered by this court, not only in their capacities as trustees, but also in their individual corporate capacities." (Record in No. 107 October Term, 1957; A3).

trustees did not appear in the Florida proceedings. The circuit court in Florida decided that it had no jurisdiction over the trust assets or the non-answering defendants Wilmington Trust Company and Delaware Trust Company, who had not been personally served with process, and by its summary final decree entered on January 14, 1955, it dismissed the suit against all the nonappearing defendants including these two defendants, but without considering or applying Delaware law declared that the powers of appointment were testamentary in character, were not executed in the manner required for testamentary instruments in Florida, did not constitute valid inter-vivos trust appointments, and therefore the assets held by Wilmington Trust Company, Trustee under the trust agreement of 1935 passed under Mrs. Donner's will and not pursuant to the instruments in writing of 1949 and 1950 (A83).

On appeal, the Florida Supreme Court not only held that Florida law would be applied to determine the validity of the Delaware trust and the exercise of powers of appointment thereunder (A213), disregarding the judgment of a Delaware court with respect to the same trust upholding its validity and the exercise of the powers of appointment (A212), but reversed the lower court with respect to its finding of lack of jurisdiction over these two respondents (A217). The Florida Supreme Court[2] held that Florida

2. "With respect to the assertion by the Florida Court that the settlor had divested herself of virtually none of her control over the property, it may be interesting to observe the change made in § 57 of the *Restatement of the Law, Second*, 'Trusts'; which we believe was adopted by the American Law Institute in its May meeting of 1957, as follows:

> " 'Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, *and a power to control the trustee as to the administration of the trust.*' " (Emphasis ours.)

jurisdiction existed by virtue of the Will (A210) and upon the theory that the exercise of the power of appointment after Mrs. Donner became a resident of Florida constituted a republication of the original trust instrument as if it had been originally executed in Florida (A213), although this is not the law of Delaware (A236). The Delaware Supreme Court determined that full faith and credit was not to be accorded the Florida judgment as a judgment *in rem*, since the *res* was in Delaware, and no personal jurisdiction was acquired over these respondents; also, for lack of personal jurisdiction, the Florida judgment could not bind these respondents *in personam* (A238). The Delaware Supreme Court further held that the Delaware trust was a valid trust and the powers of appointment thereunder were validly exercised (A244).

III. ARGUMENT.

1. The Delaware Supreme Court Properly Refused to Accord Full Faith and Credit to the Judgment of the Florida Supreme Court as to These Respondents.

Petitioners' brief erroneously states that neither the Delaware Supreme Court nor the respondents in this case have questioned the jurisdiction of the Florida Court over the subject matter (Brief, p. 12). The trouble arises from the use of the words "subject matter". As far as the Delaware action was concerned, the "subject matter" of the suit was property which had its only situs in the State of Delaware; viz, the assets of the Delaware trust. With respect to this property located in Delaware, the Delaware Court was required to determine to whom it should be distributed. In reaching such determination, the Delaware Court was required to determine whether the trust which was created and had its situs in Delaware was valid under Delaware law and whether the power of appointment with respect to the trust property had been validly exercised. This determination was made by the Delaware Supreme Court, and in so doing the Delaware Court not only questioned the jurisdiction of the Florida Court with respect to the "subject matter", but found that no such jurisdiction existed (A241). These respondents also deny any jurisdiction of the Florida Court over the "subject matter", by which we refer to the trust assets located in the State of Delaware. As the Delaware Supreme Court said (A238):

> "The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding

the assets voluntarily brought them before the Florida courts."

The Florida Court assumed to sustain its jurisdiction by virtue of the Will and an assumed republication of the trust instrument by the exercise of the power of appointment (A213), and upon this basis held that it had jurisdiction over the non-resident defendants by substituted service although it was admitted that neither of the Trustees nor any of the trust property had ever been located in Florida.

Petitioners' attempt to justify the Florida Court's jurisdiction over these respondents by constructive service can only be based upon the theory of a proceeding *in rem*. However, since the property in suit was located in Delaware, the only *in rem* proceeding with respect to such property would have to be in Delaware. The case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 94 L. Ed. 865, quoted by petitioners, clearly holds that it is Delaware and not Florida which has *in rem* jurisdiction with respect to the property here. This Court said:

> "It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

On the authority of the *Mullane case*, only Delaware had *in rem* jurisdiction to determine the interest of all claimants, and it is no authority to sustain constructive service on these respondents by the Florida courts.

Petitioners further argue that the Delaware Supreme Court applied the "strict doctrine" of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, thereby implying that there has been some change in the doctrine of that case with respect to its jurisdictional requirements, but no authority is cited to sustain such a contention. On the contrary, this Court has repeatedly followed *Pennoyer v. Neff*. In *Riley v. New York Trust Company*, 315 U. S. 343, 86 L. Ed. 885, this Court said:

> "While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extraterritorial effect upon assets in other states. So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem;* so far as it affects personalty beyond the state, it is *in personam* and can bind only the parties thereto or their privies."

In *Baker v. Baker, Eccles & Company*, 242 U. S. 394, this Court said:

> "But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the Act of Congress passed pursuant to it do not entitle a judgment *in personam* to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

The most recent decisions of this Court also apply the same doctrine, and deny full faith and credit to judgments of state courts rendered with respect to property rights of nonresidents, who were not personally served, concerning property located in another state.

Armstrong v. Armstrong, 350 U. S. 568,

Vanderbilt v. Vanderbilt, 354 U. S. 416.

It is to be borne in mind that the record shows that the Trustees (these respondents) had no contacts what-

soever with the State of Florida. The only limitations upon the rule of *Pennoyer v. Neff*, we submit, are those cases involving status, such as divorce, or in which this Court has found that there have been such contacts by the defendant with the jurisdiction rendering the judgment *in personam* that the suit does not offend "traditional notions of fair play and substantial justice".

International Shoe Co. v. Washington, 326 U. S. 310;
McGee v. International Life Insurance Co., No. 50, October Term, 1957; 26 Law Week, 4073.

It is submitted, furthermore, that Delaware is not required to yield the assertion of her public policy with respect to the validity of the trust agreement and the exercise of the powers of appointment by the determination of the Florida Court based purely upon the theory of a testator's domicile that the trust instrument and the exercise of the power were invalid. *Pink v. A. A. A. Highway Express*, 314 U. S. 201.

Upon facts similar to those presented here, and unlike Florida, the Courts of other states have recognized their lack of jurisdiction to adjudicate rights with respect to trust property located in a foreign state, when personal service could not be made on the foreign trustee.

Lines v. Lines (Pa. 1891), 21 Atl. 809;
Sadler v. Industrial Trust Company (Mass. 1951), 97 N. E. (2d) 169.

Like the Delaware Supreme Court, these authorities recognized that the trustee is an indispensable party to a suit involving trust property, who is not in privity with certain beneficiaries of the trust. This Court also held that a trustee was a necessary party to an action testing the validity of a trust in *McArthur v. Scott*, 113 U. S. 340 (396).

Finally, petitioners now state (Brief, pp. 22-23) that they are not seeking judgments *in personam* against these two respondents, although on the record before it, the Delaware Supreme Court found that was the relief petitioners sought (A237). At the same time, petitioners assert that Delaware should give such relief as may be necessary to implement the Florida judgment which could only be an *in personam* judgment against these respondents. It is impossible to follow this reasoning. If the petitioners do not seek any relief against these respondents, the judgment of the Delaware Supreme Court should be affirmed; on the other hand, if petitioners seek to enforce the Florida judgment against these respondents, it can only be enforced by treating the Florida judgment as a judgment *in personam* against these respondents, which petitioners concede they have no right to do, and again the Delaware Supreme Court judment should be affirmed.

2. There Can Be No Error by the Delaware Supreme Court in Holding That the Trust Agreement of March 25, 1935, and the Exercise of the Powers of Appointment Thereunder Were Valid.

Under this point, petitioners apparently contend that the Delaware law is different than the Delaware Supreme Court states it to be. This contention in refuted by the petitioners under their first point, when they state (Brief, p. 21):

> "We do not challenge the right of the Delaware Court to announce that Delaware law involving the construction of a trust agreement may differ from Florida law and to make that the law of Delaware, * * *."

In support of this contention, petitioners incorporate by reference arguments made by the appellees in a brief filed in another case. Since these respondents have not been

served nor furnished copies of the briefs referred to, it is impossible for them to answer such argument.

However, regardless of what such arguments may be, the law applicable thereto is beyond question. The only common law is that of the several states, and each state determines its own common law which is binding on all other courts.

> *Erie Railroad Co. v. Tompkins*, 304 U. S. 64;
> *Klaxon Co. v. Stentor Electric Mfg. Co.*, 316 U. S. 685.

It follows that if the Delaware Supreme Court has determined that the trust in question and the exercise of the powers of appointment thereunder are valid under Delaware law, neither this Court nor any other court can determine that the law of Delaware is different in this respect than what the Delaware Supreme Court has stated it to be.

As this Court stated, in *Riley v. New York Trust Company, supra:*

> "Subject to the Constitutional requirements, Delaware's decisions are based on Delaware jurisprudence. Her sovereignty determines personal and property rights within her territory."

Therefore, this Court can not determine that the Delaware Supreme Court erred in holding that the trust agreement and the exercise of the powers of appointment thereunder were valid under Delaware law.

We furthermore submit that no Federal question is presented in respect of the validity of the trust instrument.

> *Estin v. Estin*, 334 U. S. 541;
> *United States v. Burnison*, 339 U. S. 87.

IV. CONCLUSION.

For the reasons and upon the authorities herein cited, it is submitted that the Delaware Supreme Court was not required to give full faith and credit to the Florida judgment with respect to these respondents, and this appeal should be dismissed for want of a substantial Federal question. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, § 58. Therefore, the judgment of the Delaware Supreme Court herein should be affirmed.

Respectfully submitted,

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